IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20089 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ATULBHAI BHALCHANDRA JANI - Petitioner(s)
Versus
DISTRICT COLLECTOR-AMRELI. - Respondent(s)

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Appearance :
MR SP MAJMUDAR for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 20/09/2006

ORAL JUDGMENT

1.Heard learned advocate Shri S.P.Majmudar on behalf of the petitioner. The petitioner has challenged the order passed by Gujarat Civil

Services Tribunal, Gandhinagar in Appeal No.200 of 2004 (689) dtd.21.03.2005.

2. Learned advocate Shri Majmudar has submitted that the respondent has not given effective opportunity to the petitioner for filing reply of show cause notice issued upon him. He submitted that on 31st March, 2004, a request was made by the petitioner to the respondent to grant some more time as petitioner required advice of the lawyer. However, before that, on 07th April, 2004, the order of dismissal of the petitioner has been passed by the competent authority. The petitioner was suspended by respondent by order dated 02nd July, 1994. Thereafter his headquarter was changed at Jafrabad by order dated 26th July, 1994 and suspension allowance was sanctioned by the respondent. Thereafter the petitioner was reinstated in service w.e.f. 03rd August, 1996 and posted at Jafrabad office of Mamlatdar. In response to that order, the petitioner was resumed duty on 30th September, 1996 where he

remained in service upto 01st January, 1998.

3.The learned advocate Mr.Majmudar has, therefore, submitted that during the period of suspension no subsistence allowance has been paid to the petitioner by the respondent. He relied on decision of Apex Court reported in **AIR 2000 SC 2806** in the case of **Jagdama Prasad Shukla Vs. State of U.P. and Ors.** and relying upon the decision, he has submitted that if during the period of suspension if subsistence allowance is not paid to the petitioner then it amounts to denying the reasonable opportunity to the petitioner which not only vitiates the inquiry but punishment also. He also submitted that Tribunal has passed an order on 16th March, 2005, there was a delay in filing the petition, but according to him, since the petitioner was not having the sufficient fund and he required some legal advice, some more time is consumed in filing the petition before this Court.

4.Learned advocate Mr.Majmudar has drawn the

attention of the court to certain paras of the decision of the Tribunal and except that no other submission is made by learned advocate Mr.Majmudar and no other decision has been relied upon by learned advocate before this Court.

5.I have considered the submissions made by learned advocate Shri Majmudar. I have also perused the order passed by respondent. The misconduct which has been committed by petitioner to remain un-authorisedly absent is deliberate misconduct without prior permission of authority. It is necessary to note that from 30th September, 1996 upto 24th December, 1997 i.e. out of about more than 15 months period he remained present for only 13 days. Meaning thereby one day present for one month. It is also less than that because total period is 15 months wherein he remained present only for 13 days. Such absence not merely unauthorised but it was deliberate with a purpose to work as Trustee in various educational institutions i.e. (i) Tunni Vidhyalaya, Jesingpara, Amreli,

(ii)Sarvodaya Vidhyalaya, Pansada, Tal:Babra, (iii) Pragati Highschool, Dudhada, Tal:Dhari and (iv) Madhyamik School, Dedan, Tal:Rajula. This fact has been proved on the basis of information from these institutions as informed by District Education Officer, Amreli to the authority wherein the petitioner has worked as a Trustee in these four educational institutions and also doing administrative and financial affairs on behalf of educational institutions. It is necessary to note that during these 15 months neither any leave report nor any medical report was submitted by the petitioner and without submitting any kind of reports he deliberately remained absent unauthorisedly. Therefore, ultimately, by an order dated 18th April, 2002, the petitioner was dismissed from services by Collector, Amreli. This order was challenged by the petitioner before the Tribunal being Appeal No.158 of 2002, which has been decided by the Tribunal on 28th June, 2002. The Tribunal has set aside the order of dismissal coming to the conclusion that it has been passed without detailed inquiry and against the rules and

principles of natural justice. The Tribunal also remanded the matter to the Competent Authority to comply with the procedures laid down in Gujarat Civil Services (Discipline and Appeal) Rules, 1971 before imposing any penalty. Thereafter, on 10th February, 2003 a charge-sheet was served upon the petitioner qua the misconduct of the petitioner remaining absent unauthorisedly from 07th May, 1999 to 18th April, 2002 for a period of three years. He remained present for a period of 5 days. So total from the year 1996 to 2001, the petitioner had worked while remaining present with respondent about 18 days only. Ultimately, inquiry was conducted against him. He remained absent further in the year 2002 and also remained absent from 02nd November, 2002 onwards. After completion of departmental inquiry, charges levelled against the petitioner are proved and accordingly show cause notice was served to the petitioner on 12.03.2004 with a 15 days time to file reply to the notice. The said period was over on 27th March, 2004. However, till the date no reply was filed by the petitioner and no extension

application was filed. Therefore, ultimately on 07th April, 2004 the Collector, Amreli passed a dismissal order against the petitioner. In departmental inquiry reasonable opportunities were given to the petitioner. According to the inquiry report submitted by the Inquiry Officer out of five charges levelled against the petitioner, charge nos.1, 3 and 5 were partly proved whereas as charge nos.2 and 4 were not proved. Therefore, considering the totality of the facts, the competent authority passed dismissal order against the petitioner.

6. The Tribunal has considered the contention raised by the petitioner before the Tribunal and Tribunal has examined the matter in respect to the contention raised by the petitioner about denial of reasonable opportunities by way of not paying suspension allowance to the petitioner by the respondent. The contention raised by the petitioner before the Tribunal that not paying suspension allowance during the period of suspension amounts to denying the reasonable opportunities to the petitioner. The Tribunal

has considered that petitioner remained absent for a long period i.e. out of 15 months of his service tenure, he remained present only for 13 days which shows that petitioner was not interested in the job of Clerk and his plea of financial crisis cannot be considered as valid ground when he himself forgotten his salary for a long period by remaining absent from service. Therefore, the contention raised by the petitioner has been rejected.

7. Learned advocate Shri Majmudar has relied upon the decision of the Apex Court rendered in **AIR 2000 SC 2806** that non-payment of subsistence allowance amounts to denying reasonable opportunity to the petitioner. The law subsequently has been settled on this aspect that merely non-payment of subsistence allowance ***ipso facto*** inquiry cannot be considered vitiated unless and until the petitioner is able to establish the prejudice caused to the petitioner for nonpayment of subsistence allowance. In facts of this case, the petitioner has not established before the Tribunal that due to

nonpayment of subsistence allowance prejudiced has been caused to him. Simple reason is that when reinstatement order has been passed after completion of suspension period on 03rd August, 1996 even though he remained absent for about 15 months and remained present for only 13 days. Hence, there is no financial difficulty to the petitioner therefore not work with the respondent as a Clerk. The payment of subsistence allowance has some meaning that if person is suspended so he may defend the case properly before the Competent Inquiry Officer and Competent Authority. But, in the light of facts before this Court, in the present case, after completion of suspension period on 03rd August, 1996, he was posted at Jafrabad in office of Mamlatdar but not remained present for a period of 15 months and only remained present for only 13 different days. Meaning thereby that petitioner was not facing any financial difficulty otherwise the permanent employee should not remain absent for such a long period. Therefore, financial position of the petitioner was sound and no prejudice is caused to the

petitioner for non payment of subsistence allowance. The law is now well settled that violation of principles of natural justice or any violation of rules and regulation which can be considered to be denial subject to establishing the case by the employee concerned that due to that violation the prejudice has been caused to the employee otherwise such prejudice has to be considered as technical breach and the same cannot vitiate the inquiry and punishment order. In departmental inquiry/proceedings the principles of prejudice is applicable as decided by **Full Bench of Andhrapradesh High Court** in case of **K.Swarnakumari Vs. Government of Andhra Pradesh reported in 2006 110 FLR 282**. Therefore, now basic requirement is that employee concerned has to establish the prejudice due to violation of either any rules regulation or principles of natural justice. Therefore, as per the decision of the Apex Court which has been relied upon by learned Advocate Shri Majmudar, no prejudice caused to the petitioner which is not established by the petitioner himself before the

Tribunal and hence not applicable to the facts of the present case. The Tribunal has considered that not to remain present and remained absent without prior permission is a serious misconduct, and therefore that misconduct has been proved beyond reasonable doubt before inquiry officer and looking to the conduct of the petitioner the punishment of dismissal is proper and cannot be considered to be disproportionate. According to the Tribunal the punishment of removal is fully justified on the basis of facts which are not disputed even by the petitioner in case of absent unauthorisedly, but in facts of this case according to my opinion it was a deliberate absent with a purpose to work as a Trustee in the different educational institutions and to get more amount in comparison to the present salary. Therefore, the petitioner remained absent for a period of 15 months continuously and thereafter for further two years without any salary because he was working with educational institutions. The decision of Apex Court in the case of **V.P. Vs. Union of India reported in 2006 SC 1101** wherein

an employee concerned remained absent for a period of 5 ½ months on the ground of illness and the Apex Court has considered the punishment of dismissal is proper. The Apex Court has considered same question in case of **Indra Bhanu Gaur Vs. Committee, Management of M.M.Degree College and Ors.** reported in (**2004) 1 SCC 281** wherein the apex court has held in **paras:6 and 7** as under:-

"**Para:6-** In response, the learned counsel for the Managing Committee submitted that in order to get subsistence allowance a particular procedure was to be followed, which was not done by the appellant and subsistence allowance thereafter has been subsequently paid. So far as the son's case is concerned, the action against him was set aside because of non-compliance with the requirement of principles of natural justice and not on account of any specific finding objectively recorded that no irregularities as such took place or that the petitioner was innocent as well. In fact, the High Court had directed the authorities to proceed afresh after grant of opportunity. The University thought otherwise, and the Vice-Chancellor directed declaration of the result. That, per se, does not take away the right to proceed against the appellant. Finally, the order goes to show that eight of the eleven members agreed for action

against the appellant in the manner done. There was no question of any bias, and there was a collective decision. The appellant was granted adequate opportunity as the factual scenario would to show and he having failed to avail them, cannot make a grievance.

Para:7:- From the judgment of the High Court, in the writ petition it appears that there is no reference to the alleged infirmity on account of subsistence allowance having not been paid. There was also no specific finding recorded for the question of bias as alleged presently. We find that there was total lack of cooperation from the appellant as the factual background highlighted above would to to show. Ample opportunity was granted to the appellant to place his case. He did not choose to dos so. It is only a person who is ready and willing to avail of the opportunity given and indulgence shown exhibited defiance and total indifference to extending cooperation. Therefore, on that score the appellant cannot have any grievance. So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. The appellant could not plea or substantiate also that the nonpayment was either deliberate or to spite him and not due to his own fault. It is

ultimately a question of prejudice. Unless prejudice is shown and established, mere nonpayment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as absolute proposal in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings."

In case of **U.P.State Textile Corpn. Ltd. Versus P.C.Chaturvedi and Ors.** reported in **2005 8 SCC 211 wherein in Paras:14, 15 and 16 the Apex Court has held that:**

" **Para:14:-** It is to be noted that no grievance was made at any time during the pendency of the proceedings that Respondent 1 employee was being prejudiced on account of non-payment of subsistence allowance. In fact, for the first time the request was made for payment of subsistence allowance on 5.1.1993 i.e. after completion of the enquiry. The ration in ***Indra Bhanu Case [{2004} 1 SCC 281:2004 SCC (L&S) 176]*** is clearly applicable to the facts of the present case.

Para:15:- As per the Uttar Pradesh State Textile Corporation Conduct, Control and Disciplinary

Rules, 1992 (in short “the Rules”) Rule 41 provides as follows:

“41. *Subsistence allowance during suspension.-* An employee under suspension shall be entitled to draw subsistence allowance equivalent to 50% of his basic pay plus 50% dearness allowance provided that the emplyee is not engaged in any other employment or business or profession or vocation. The subsistence allowance would be payble only when the employee, if required, presents himself every day at the place of work or such other place as mentioned in the relevant order. Further, the employee, under suspension would have to furnish a certificate that he is not engaged in other employment, business profession or vocation for entitlement of subsistence allowance.

Variation in amount of subsistence allowance:- (2) Where the period of suspension exceeds six months, the authority which made or is deemed to have made the order of suspension, shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first six months as follows:

(a) the amount of subsistence allowance may be increased up to 75% of the basic pay and dearness allowance thereon if the period of suspension has been prolonged for reasons, to be recorded not directly attributable to the suspended employee;

(b) the amount of subsistence allowance my be reduced up to 25% of the basic pay and dearness

allowance thereon if the period of suspension has been prolonged due to reasons, to be recorded, directly attributable to the suspended employee."

Para:16. Rule 41 provides that the subsistence allowance is payable only when the employee, if required, presents himself every day at the place of work. Obviously, for establishing that the employee had presented himself at the place of work, the authorities had clearly stipulated a condition that the attendance register was to be signed. No explanation was offered by Respondent 1 employee as to why he did not sign the register. It cannot be lightly brushed aside as technical and/or inconsequential. As admittedly, Respondent 1 employee had not signed the attendance register even though specifically required in the order of suspension, the High Court was not justified in coming to a conclusion that the non-signing was not consequential or a bona fide lapse. It is also to be noted that at various points of time the employer informed Respondent 1 employee about the consequences of his not signing the attendance register as stipulated in the order of suspension."

8. In view of observations made by the Tribunal according to my opinion, the Tribunal has rightly dealt with comprehensively examined the

matter and looking to the overall performance of the petitioner which has been reflected in the order the punishment of dismissal has been fully justified. For that the Tribunal has not committed any error which requires any interference of this Court while exercising power under Article 227 of the Constitution of India. This Court under Article 227 of the Constitution can not re-appreciate the evidence which has been appreciated by the Inquiry Officer as well as power of judicial review is very limited. This Court cannot act as an Appellate Authority as per decision of Apex Court in the case of **Indian Overseas Bank Vs.I.O.B. Staff Canteen Workers' Union** reported in **AIR 2000 SC 1508, it is held in Para:19 that:**

“ The learned single Judge seems to have undertaken an exercise, impermissible for him in exercising writ jurisdiction, by liberally reappreciating the evidence and drawing conclusions of his own on pure questions of fact, unmindful, though aware fully, that he is not exercising any appellate jurisdiction over the awards passed by a Tribunal, presided over by a Judicial Officer. The findings of fact recorded by a fact-finding authority duly constituted for the purpose and which ordinarily

should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another view which can be reasonably and possibly one taken. The Division Bench was not only justified but well merited in its criticism of the order of the learned single Judge and in ordering restoration of the Award of the Tribunal. On being taken through the findings of the Industrial Tribunal as well as the order of the learned single Judge and the judgment of the Division Bench, we are of the view that the Industrial Tribunal had overwhelming materials which constituted ample and sufficient basis for recording its findings, as it did, and the manner of consideration undertaken, the objectivity of approach adopted and reasonableness of findings recorded seem to be unexceptionable. The only course, therefore, open to the writ Judge was to find out the satisfaction or otherwise of the relevant criteria laid down by this Court, before sustaining the claim of the canteen workmen, on the facts found and recorded by the fact-finding authority and not embark upon an exercise of re-assessing the evidence and arriving at findings of ones own, altogether giving a complete go-bye even to the facts specifically found by the

Tribunal below.”

9. According to my opinion, no error has been committed by Tribunal which requires any interference under Article 227 of the Constitution of India. Hence, there is no substance in the present petition. Accordingly the present petition is disposed of.

(H.K.RATHOD, J.)

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